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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. ~~952~~

CHARLES R. PERRY, ET AL.,
Petitioners,

vs.

ROBERT P. SINDERMANN, for himself and for all others similarly situated,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT

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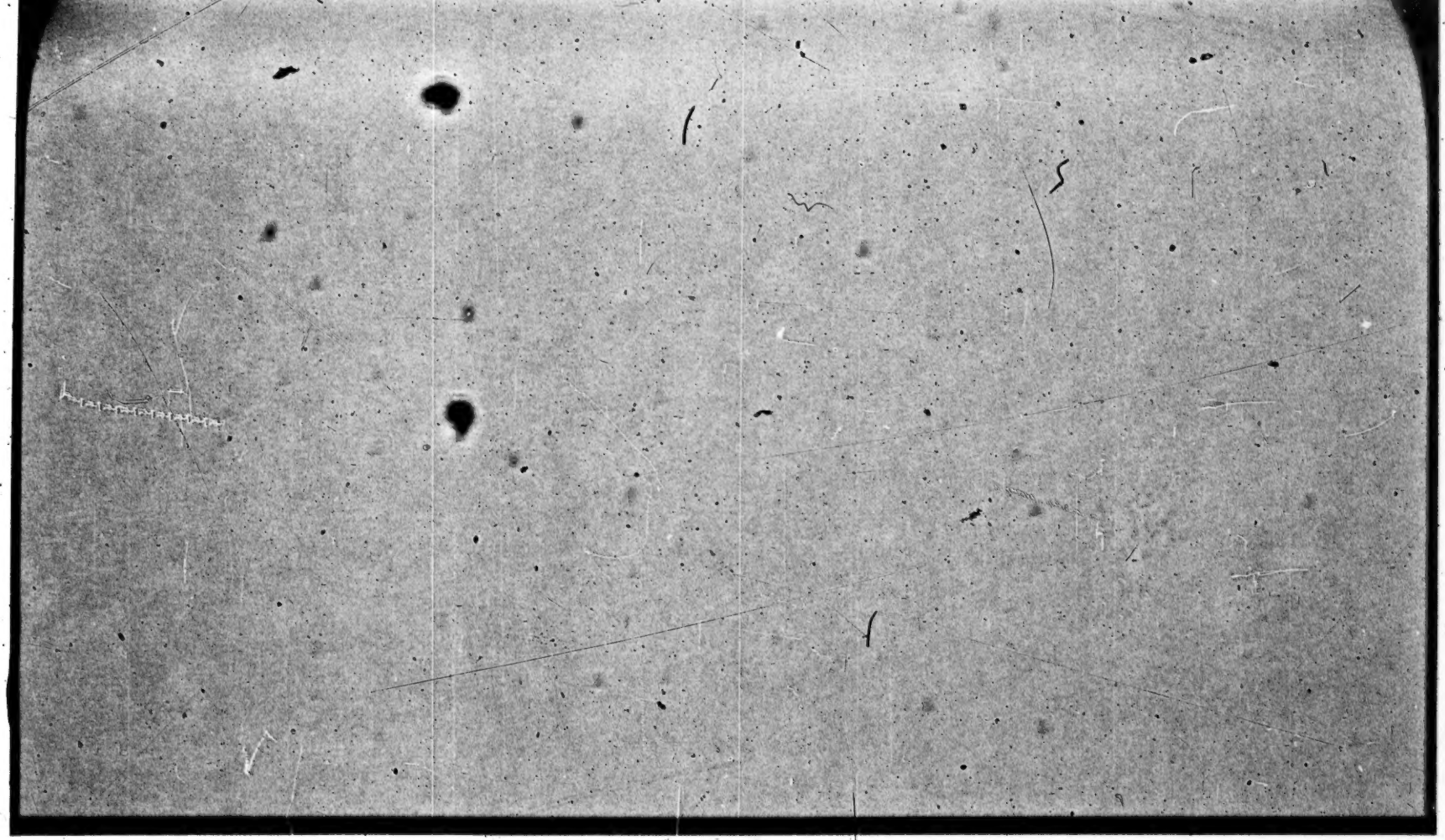

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 52

CHARLES R. PERRY, ET AL.,
Petitioners,

vs.

ROBERT P. SINDERMANN, for himself and for all others similarly situated,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Respondent, Robert P. Sindermann, for himself and others similarly situated, prays that a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit be denied because the Judgment is a correct statement of the law of Summary Judgment

procedure, the right to a hearing in the U. S. District Court of a non-tenured teacher in a public educational institution who brings a complaint under the Civil Rights Act of 1871, 42 U.S.C. Sec. 1983, and, the rights of a non-tenured teacher in a public educational institution under the Due Process Clause of the Fourteenth Amendment when his teaching contract is not renewed for reasons which the teacher claims are an infringement on his constitutional rights under the First Amendment.

OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 430 F.2d 939 (1970) The findings and conclusions of the United States District Court for the Western District of Texas (R. 99-101) are set forth in footnote 7 of the opinion of the Court of Appeals.

QUESTIONS PRESENTED

This case, brought under the Civil Rights Act of 1871, 42 U.S.C. §1983, raises two constitutional issues:

1. Whether a complaint by a nontenured teacher in a public educational institution, alleging that the teacher's contract was not renewed because he exercised First Amendment rights of expression, association and petition, states a claim under Section 1983 of the Civil Rights Act of 1871, 42 U.S.C. §1983, upon which relief can be granted.

2. Whether a nontenured teacher's rights of procedural due process under the Fourteenth Amendment are violated when a public educational institution, in refusing to renew the teacher's contract, fails to provide the teacher with notice and the opportunity for a hearing.

STATEMENT

We adopt the Statement of Fact of the NEA as amicus curiae.

REASONS FOR DENYING THE WRIT

Respondent contends that this case is not the proper vehicle for review of the conflict between the circuits on the broad constitutional questions of a nontenured teacher's rights under the First and Fourteenth Amendments of the U. S. Constitution because this cause will have to be remanded to the U. S. District Court for further hearings, regardless of how the conflict between the Circuits is resolved, as the Appellate Court below points out:

> "However, a valid distinction might be drawn between a dismissal on bare bones pleadings as was involved in *Pred*, and a disposition on summary judgment as in the case sub judice. This Court has affirmed the use of summary judgment to dispose of constitutional issues, Hawthorne v. United States, 115 F.2d 805 (5th Cir. 1940), see also Dawkins v. Green, 285 F.Supp. 772 (N.D. Fla. 1968), but this form of disposition is often inappropriate in cases involving issues of far-flung import. *Compare* Hall v. Garson, 430 F.2d 430 (5th Cir. 1970) Part II B; Kennedy v. Silas Mason Co., 334 U.S. 249, 68 S.Ct. 1031, 92 L.Ed. 1347 (1948); and Dispatch, Inc. v. City of Erie, 364 F.2d 539 (3rd Cir. 1966). It was totally inappropriate in the case at bar, where the only affidavits on which summary judgment was based were submitted by the plaintiff and where there was a clear offer to prove facts constituting a constitutional claim. Whitaker v. Coleman, 115 F.2d 305 (5th Cir. 1940). Summary judgment should be granted only when the truth is clear, where the basic facts are undisputed and the parties are not in disagreement regarding material factual inferences that may be properly drawn from such facts. Cole

v. Chevron Chemical Co., 427 F.2d 390 (5th Cir. 1970). While there was no dispute about the facts underlying Sindermann's contract status with Odessa College, the truth of his constitutional position was far from clear. The basic facts, as well as the material inferences to be drawn therefrom, were in total dispute. Summary judgment was improper. We explicitly note that we deal only with procedures and not with the merits. The remand for factual explication is made with no intimation whatsoever as to what outcome such further development should produce." (Pet. App. A, at 8-9)

Respondent alleged in his complaint, among other things:

XIX

"That the Plaintiff was advised on May 19, 1969, by the Defendant, Dr. Jack Rodgers, purporting to act under due authority, that his contract would not be renewed for the year 1969-1970. (Cf. Appendix "F")

XX

"That the Defendants, or their agents, refused to give any reasons to the Plaintiff for their decision to not retain him as a member of Odessa Junior College faculty for the school year 1969-1970, and also that the Defendants did not offer the Plaintiff an impartial hearing into the merits of such decision.

XXI

"That the reason for such decision by the Defendants, or their agents, was to retaliate against the Plaintiff for the Plaintiff's expressions of opinion.

XXII

"That the Defendants' decision not to retain the Plaintiff was not based upon good faith on their part.

XXIII

"That the decision of the Defendants is a denial, a violation, a restraint, and a deprivation of the Plaintiff's rights to free speech under the United States Constitution.

XXIV

"That the decision of the Defendants was not made under ascertainable, and definite standards governing the Defendants in making this decision.

XXV

"That the Defendants, or their agents, have intimidated and harassed the Plaintiff and other Odessa Junior College faculty members similarly because the Plaintiff and those so situated have exercised their right to free speech in a way critical of the Defendants." (R. 87-88)

Given these allegations, the only reason for this case not to be remanded for further hearings on the Complaint would be if this Court were to decide that nontenured teachers (assuming the allegations in Respondent's Complaint to be true) could lose their teaching job for the sole reason that they exercised their First Amendment rights of expression, association and petition. This, however, would require a reversal of *Pickering* v. *Board of Education of Township Highschool District 205*, 391 U.S. 563, 88 S.Ct. 731, 20 L.Ed.2d 811.

The proper vehicle for a review of these broad constitutional issues should be a case where the lower appellate court ruled incorrectly. The Respondent has been in the Federal Courts for well over two years.

ARGUMENT

The Court decisions dealing with the substantive rights of teachers have made clear the extent of the protection afforded by the Constitution. As summarized in the recent decision in *Roth* v. *Board of Regents of State Colleges*, 310 F.Supp. 972, 976 (W.D. Wis. 1970):

> The employment of a teacher in a public school cannot be terminated because he has exercised that freedom secured to him by the Constitution of the United States. Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968); Keyishian v. Board of Regents, 385 U.S. 589, 605, 606, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); Slochower v. Board of Higher Education, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692 (1956); Wieman v. Updegraff, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216 (1952); Pred v. Board of Public Instruction, 415 F.2d 851 (5th Cir. 1969); McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968); Bomar v. Keyes, 162 F.2d 136 (2d Cir. 1947), cert. den. 332 U.S. 825, 68 S.Ct. 166, 92 L.Ed. 400. This substantive constitutional protection is unaffected by the presence or absence of tenure under state law. Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966), cert. den. 385 U.S. 1003 [87 S.Ct. 706, 17 L.Ed.2d 542]; see McLaughlin v. Tilendis, *supra;* Bomar v. Keyes, *supra;* Lucia v. Duggan, 303 F.Supp. 112, 118 (D.Mass. 1969). Nor is it material whether employment is terminated during a given contract period, or not renewed for a subsequent period. McLaughlin v. Tilendis, *supra.*

Respondent realizes that there is a conflict of opinion between the Fifth Circuit in *Pred* v. *Board of Public Instruction*, 415 F.2d 851 (1969); *Ferguson* v. *Thomas*, 430 F.2d 852 (1970); *Sindermann* v. *Perry, supra; Lucas* v. *Chapman*, 430 F.2d 945 (1970); *Thaw* v. *Board of Public Instructions*, 432 F.2d 98 (1970), and the Tenth Circuit in *Jones* v. *Hopper*, 410 F.2d 1323 (1969). However, the

Fourth Circuit also holds that a nontenured teacher cannot have his contract terminated because of his exercise of his constitutionally protected First Amendment guarantees, *Johnson* v. *Branch*, 364 F.2d 177 (1966), cert. den. 385 U.S. 1003. The First, Second and Seventh Circuits also follow this reasoning: *Lucia* v. *Duggan*, 303 F.Supp. 112 (D. Mass., 1969); *Bomar* v. *Keyes*, 162 F.2d 136 (2d Cir., 1947); and, *McLaughlin* v. *Tilendis*, 398 F.2d 287 (7th Cir., 1968). Though one cannot be blinded by partisan advocacy to the fact that the Tenth Circuit disagrees with the Fifth Circuit on the constitutional issues raised in this case, Respondent believes that the lower appeal Court's decision in this case is dispositive and not much more can be added to what they have said. Besides, the Fifth Circuit finds itself in agreement with the First, Second, Fourth and Seventh Circuits.

CONCLUSION

Writ should be denied in this case for the above reasons.

Respectfully submitted,

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By: .....
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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Brief Of Respondent was this 2nd day of June, 1971, placed in the United States Mail, postage paid, Certified Mail, Return Receipt Requested, properly addressed to each of the following attorneys:

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